

**BEFORE THE STRUCTURAL PEST CONTROL  
DISCIPLINARY REVIEW COMMITTEE  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
Agricultural Commissioner of  
the County of San Diego  
(County File No. 735-SCP-SD-06/07)

Docket No. S-014

**DECISION**

**Antimite Associates, Inc.  
5867 Pine Avenue  
Chino Hills, California 91709**

Appellant/

**Procedural Background**

Pursuant to Business and Professions Code (BPC) section 8617, the San Diego County Agricultural Commissioner (CAC) may levy a civil penalty up to \$5,000 for each "serious" violation of certain State pesticide laws.

After notice and a hearing, the CAC found that Antimite Associates, Inc. violated the California Code of Regulations, title 3, (3 CCR) sections 6738(b) and (c) by failing to assure its employee were required personal protective equipment (PPE). The CAC imposed a total penalty of \$750.

Antimite appealed the CAC's penalty to the Structural Pest Control Disciplinary Review Committee ("DRC"). The DRC has jurisdiction of the appeal under BPC section 8662. Members serving on the Disciplinary Review Committee were Peter Giammarinaro for the structural pest control industry, Dennis Patzer for the Structural Pest Control Board (SPCB), and Eric Walts for the Department of Pesticide Regulation (DPR). The Committee heard oral argument via telephonic conference on July 15, 2008. Richard Swope represented the appellant, and Sally Lorang represented the CAC.

**Standard of Review**

The Committee decides the appeal on the record of the hearing. If substantial evidence in the record supports the CAC's decision, we affirm it. Under the substantial evidence standard of review, the Committee defers to the Hearing Officer's determination of facts if a reasonable fact finder could have reached the same conclusion, based on the evidence in the record and inferences from that evidence, even if the record also supports a different conclusion. Issues of witness credibility are the province of the Hearing Officer. The Committee decides issues of law using its independent judgment.

**Background**

On June 4, 2007, Brady A. Persky, as an employee of Antimite, applied the pesticide Talstar/FMC (EPA Reg. No. 279-3206) with a sprayer, without wearing protective eyewear or chemical resistant gloves, as required under 3 CCR section 6738. (Stipulation; Exhibit A).

### **Appellant's Contention**

Antimite contends on appeal that it did not violate 3 CCR section 6738 because it assured that employees wore the protective eyewear and gloves when required, notwithstanding Mr. Persky's failure to do so.

### **Analysis**

- 3 CCR Section 6738 imposes a very high standard on employers.

"The employer shall assure that" gloves and eyewear are worn when required by the product label or when applying pesticides by hand. (Cal. Code Regs., tit. 3, § 6738 subd. (b) & (c).) "Assure" means "to make certain the coming or attainment of : guarantee."<sup>1</sup> Thus, on its face, 3 CCR section 6738 simply makes Antimite responsible for whether its employees wear required PPE. In common usage, Antimite's contention that it assured Mr. Persky wore gloves and goggles, when in fact he did not, is nonsensical.

However, the regulations provide a definition of "assure" that controls over ordinary English for the purposes of section 6738.

"Assure" or "Ensure" means to take all reasonable measures so that the behavior, activity, or event in question occurs. When the behavior, activity, or event in question involves or concerns an employee, reasonable measures by an employer include determining that the employee has the knowledge to comply; providing the means to comply; supervising the work activity; and having and enforcing a written workplace disciplinary action policy covering the employer's requirements, as well as other measures required by pesticide law or this division. (Cal. Code Regs., tit. 3, § 6000.)

The qualification "reasonable" in this context can have no other purpose but to indicate there are some instances where the efforts of the employer relieve it of responsibility for the violation. Hence, notwithstanding the ordinary meaning of assure, DPR's interpretation has been that to show a violation of 3 CCR section 6738, the CAC must identify some respect in which the employer failed to undertake "all reasonable measures."<sup>2</sup> See, e.g., Hearing Officer Roundtable Project, § 7.4 (giving guidance on how to evaluate an employer's compliance with 3 CCR section 6738).

However, there is good reason to interpret DPR's regulations requiring an employer to assure its employees wear PPE as establishing an extremely high standard. First, as discussed above, the common meaning of "assure" would suggest that the employer is absolutely responsible. Though DPR's regulations deviate from ordinary usage of "assure," we must assume that deviation is slight. In addition, DPR's worker protection regulations are to be read as consistent with, and as least as strict as, the federal worker protection standards whenever

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<sup>1</sup> Merriam-Webster online dictionary, available at <http://www.merriam-webster.com/dictionary/assure>

<sup>2</sup> The rule of *respondeat superior* is inapplicable. Under section 6738, Antimite is directly charged as Mr. Persky's employer for its own act, failure to assure that he wore PPE, not under a theory of vicariously liability.

possible. (Cal. Code Regs., tit. 3, § 6701.)<sup>3</sup> The federal worker protection standards use the same “employer shall assure” language regarding PPE. (See, e.g., 40 C.F.R. § 170.240(e).) However the federal regulations do not supply a regulatory definition of assure, and thus presumably use the word to require employers to make certain or guarantee that PPE is worn by their employees.

Finally, the Business and Professions Code, which regulates structural pest control, directs the CAC to cite the employer whenever an employee is found not wearing PPE unless it has evidence of specific measures the employer undertook *and* “the employer has no history of repeated violations . . .” (Bus. & Prof. Code, § 8616.9.) This statute addresses the CAC’s exercise of discretion. Under section 8616.9, the CAC could still cite the employer even if all the criteria of that section were met, it would just have the choice not to do so. At least in the context of structural pest control, BPC section 8616.9 expresses the Legislature’s policy that the employer be held accountable when its employees fail to use PPE where there are past violations. We read DPR’s worker protection regulations as consistent with this statute.

Thus, when an employee does not wear required PPE, the fact of multiple past PPE violations within that company creates a presumption that the employer did not exercise all reasonable measures to assure that the employee wore PPE.

- Substantial evidence supports the CAC’s determination that Antimite failed to assure Mr. Persky wore PPE.

The County offered undisputed evidence that 1) Mr. Persky did not wear the required PPE (Stipulation), and 2) three other Antimite employees did not wear required PPE in the two years prior to Mr. Persky’s violation (Exhibit 11). As discussed above, taken by itself, the fact of four failures to wear PPE, by four separate employees, within a two year period is substantial evidence from which a reasonable hearing officer could infer that Antimite failed to assure that Mr. Persky wore the required PPE. The burden was then on Antimite to show that they did take “all reasonable measures.”

Antimite did offer evidence to rebut this inference. Regarding Mr. Persky’s knowledge of the requirement, Antimite offered certificates of completion of education, and company training records and materials, which included a statement of its progressive disciplinary policy. (Exhibits B & C). We also noted evidence showing that Mr. Persky has been a licensee of the Structural Pest Control Board for 12 years (Exhibit 6). Regarding enforcement of their disciplinary policy, Antimite offered a document purporting to discipline Mr. Persky for this incident by suspending him for two days without pay, and the CAC’s inspection form where Inspector Avina wrote that Mr. Persky said that Antimite’s disciplinary program is strictly enforced (Exhibit A). Regarding supervision, Antimite offered numerous company site inspection forms for Mr. Persky (Exhibits D & E).

Antimite’s evidence is not sufficient to prevent a reasonable hearing officer from inferring that it failed to assure Mr. Persky wore his PPE. Antimite’s duty to assure its employees

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<sup>3</sup> “Whenever the context will allow, the requirements of this subchapter should be interpreted at least as strict as, and consistent, with the Worker Protection Standards in Title 40 Code of Federal Regulations, Part 170. . . .”

wear the appropriate PPE demands more than training its employees, having a written disciplinary policy, and doing internal quality control inspections. It requires that Antimite does everything it can do to prevent these types of violations, including actually enforcing its policy through a system of discipline and/or reward. (See Cal. Code Regs., § 6000, definition of “assure.”) In that regard, Antimite failed to produce any evidence that an employee had ever been disciplined for not wearing PPE except after they had been caught by the CAC, or showing any other way it proactively enforces its PPE policy. Nor did Antimite produce Mr. Persky at the hearing to explain his statements to Inspector Avina, to testify and be subject to cross-examination.

Considering Antimite’s high duty of care to assure its employees’ compliance with PPE requirements (approaching strict liability), the fact of Mr. Persky’s violation, in the context of multiple violations within a two-year period, is substantial evidence that that duty was breached.

Antimite complained at oral argument that they “had done their job.” We do not mean to minimize the efforts that Antimite has made to get its employees to wear PPE, or suggest that it is a bad actor. However, it is a fundamental principle of American law is that an employer is responsible for what its employees do in the course of their employment. DPR rules and policies that allow responsibility to be shifted entirely to the employee for PPE violations are a narrow exception to this general principle. Antimite hired employees to carry out its business. It initiates and reaps the rewards of its employees’ activities. It has the right and responsibility to train, discipline and control them so that they properly conduct its business.

#### **Appropriateness of the Fine**

On appeal, the Committee is authorized to sustain, modify by reducing the amount of the fine levied, or reverse the decision. (Bus. & Prof. Code § 8662(b)(7).) The CAC may levy a fine of \$700-\$5,000 for each “serious” violation. (Cal. Code Regs., tit. 16, § 1922.) “Serious” violations include “violations that are repeat violations of [‘moderate’ violations]”. (*Id.*) “moderate” violations pose a reasonable possibility of creating a health or environmental effect. Failure to wear PPE is at least a “moderate” violation. Antimite had previous moderate violations (Exhibit 11). Thus, the CAC’s fine is within the allowable range and we see no reason to question its choice to place the fine at the low end.

#### **Conclusion**

The Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

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**Disposition**

The CAC's decision is affirmed. The \$750 civil penalty levied by the commissioner against the appellant is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date of this decision. The appellant is to mail the payment along with a copy of this decision to:

Structural Pest Control Board  
2005 Evergreen Street, Ste. 1500  
Sacramento, CA 95815

**Judicial Review**

The appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure § 1094.5. (See Bus. & Prof. Code, § 8662.)

**STATE OF CALIFORNIA  
DISCIPLINARY REVIEW COMMITTEE**

Dated: OCT - 6 2008

By: 

Eric Walts, Member  
for and with the concurrence of all members  
of the Disciplinary Review Committee